Federal Court  Cour fédérale

Date: 20221003

Docket: T-1839-21

Citation: 2022 FC 1369

Ottawa, Ontario, October 3, 2022

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

KARSON MACKIE

Applicant

and

VIA RAIL CANADA INC.

Respondent

ORDER AND REASONS

I. Overview

[1] Mr. Karson Mackie (Mr. "Mackie"), is self-represented in these proceedings. This case concerns his appeal under Rule 51 of the *Federal Court Rules,* SOR/98-106 (the "*Rules*") to set aside the order of Associate Judge Benoit M. Duchesne ("AJ Duchesne"), dated June 10, 2022 (the "Order").

[2] The Order granted two motions in writing by the Respondent, Via Rail Canada Inc. ("VIA Rail"): a motion for leave to file a supplementary record under Rules 312(c) and 369 of the *Rules*, and a motion for an order extending the time within which it may serve and file its responding record within 30 days, under Rules 8 and 310 of the *Rules*. The Order also dismissed two cross-motions by Mr. Mackie to strike and dismiss each of VIA Rail's motions.

[3] On this motion to appeal the Order, Mr. Mackie submits that the Order was not in the best interest of justice. He submits that granting the motions causes him prejudice as the Applicant because it exacerbates the mental distress this process has caused him and worsens his vulnerability as a self-represented party. Mr. Mackie further submits that prolonging these proceedings may be dangerous for him and gives members of VIA Rail management more opportunity to target him.

[4] For the reasons that follow, this motion is dismissed. AJ Duchesne made no palpable and overriding error in granting VIA Rail's motions and dismissing Mr. Mackie's cross-motions.

II. Facts

A. *Relevant Background*

[5] On February 6, 2020, Mr. Mackie filed a complaint with the Canadian Human Rights Commission ("CHRC") against VIA Rail for alleged discrimination during his employment. In a decision dated October 29, 2021, the CHRC decided that it would not deal with Mr. Mackie's

complaint because he had not exhausted the grievance and review procedures available to him ("CHRC Decision").

[6] On December 3, 2021, Mr. Mackie filed an application for judicial review of the CHRC Decision. In January 2022, the CHRC filed a Certified Tribunal Record ("CTR") with the Court, which included material that was before the CHRC when it made its decision. VIA Rail realized that the CTR did not contain six exhibits it had filed in support of its submissions. These exhibits are listed as VIA-1 to VIA-6 and include: a collective agreement, a disciplinary letter, a return to work agreement, an email, exchanges of correspondence, and a Memorandum of Agreement dated May 20, 2004.

[7] On May 3, 2022, VIA Rail filed a motion for leave to file a supplementary record, to include these six exhibits in the record. It submitted that these exhibits were before the CHRC when it made its decision on the preliminary matter and they should therefore be in the record before the reviewing court. VIA Rail simultaneously filed a motion for an order extending the time period for filing the Respondent's record, seeking extra time to include these six additional exhibits in the record. Mr. Mackie filed two cross-motions, to strike and dismiss each of VIA Rail's motions.

B. *Order Subject to Appeal*

[8] AJ Duchesne granted VIA Rail's two motions under Rules 312(c) and 369, and consequently dismissed Mr. Mackie's motions to dismiss and strike VIA Rail's motions. AJ Duchesne began by noting that he would consider the parties' four separate motions as a single

consolidated and opposed motion pursuant to Rule 3 of the *Rules*, in the interests of proportionality and preserving the Court's resources. That being said, I reviewed each of VIA Rail's two motions in turn.

(1) Motion for leave to file a supplementary record

[9] First, AJ Duchesne reviewed the Federal Court of Appeal's decision in *Canadian Copyright Licensing Agency (Access Copyright) v Alberta*, 2015 FCA 268 ("*Access Copyright*"). In *Access Copyright*, the Federal Court of Appeal states that in order to bring materials that were before the administrative decision-maker before the reviewing court, the party must file an affidavit explaining that the document was also before the administrative decision-maker when making the decision being reviewed. AJ Duchesne then noted that VIA Rail filed its two motions without this affidavit, and the "relief sought assumes that there need not be some evidentiary support for the introduction of the omitted exhibits" (Order at para 17). AJ Duchesne also noted that VIA Rail repeatedly mentioned that the CTR was "filed" with the Court, rather than "transmitted" to the Court, even though a transmitted CTR is not part of the evidentiary record until it is filed within the parties' application records. Although AJ Duchesne acknowledged that VIA Rail's motions may have been more appropriately brought under other Rules, he proceeded to consider the requirements for granting both motions.

[10] A motion to file a supplementary record under Rule 312 must fulfill two preliminary criteria, as laid out in *Forest Ethics Advocacy Association v National Energy Board*, 2014 FCA 88 ("*Forest Ethics*"): the evidence must be admissible on the application for judicial review, and it must be relevant to the issue before the reviewing court (at para 4). AJ Duchesne found both

requirements were satisfied because the six exhibits were before the CHRC when it rendered the decision under review and they are relevant to the issue of whether Mr. Mackie had a grievance process available to him.

[11] AJ Duchesne recognized that despite satisfying these two requirements, he still had to consider whether the Court should exercise its jurisdiction to grant leave based on the evidence before it, the proper principles, and the overriding consideration of serving the interests of justice (*Forest Ethics* at para 6). On the interests of justice, AJ Duchesne applied the three questions laid out by the Federal Court of Appeal in *Holy Alpha and Omega Church of Toronto v Canada (Attorney General)*, 2009 FCA 101 ("*Holy Alpha*") at paragraph 2:

> 1. Was the evidence sought to be adduced available when the party filed its affidavits under Rule 306 or 308, as the case may be, or could it have been available with the exercise of due diligence?
>
> 2. Will the evidence assist the Court, in the sense that it is relevant to an issue to be determined and sufficiently probative that it could affect the result?
>
> 3. Will the evidence cause substantial or serious prejudice to the other party?

[12] On the first question, AJ Duchesne found merit in Mr. Mackie's argument that VIA Rail should have been more proactive in assembling its materials and filing these six exhibits earlier, when it had time to deliver its affidavit and documentary material. However, he found this argument did not outweigh the evidence that supported filing the six exhibits in the record, or the principle that the record before the administrative decision-maker should also be before the reviewing court (*Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd.*, 2016

SCC 47 at paras 36-38; *Canada (Transport v Canadian Union of Public Employees*, 2017 FCA 164 at para 32). AJ Duchesne also noted that April 21, 2022 appears to be the earliest date that VIA Rail had actual knowledge of the CTR's contents, and filed its motion for leave to include the missing exhibits the next day.

[13] On the second question, AJ Duchesne found that the six exhibits are relevant to the proceeding and should be before the reviewing court. On the third question, he found that Mr. Mackie has possessed these exhibits since March 24, 2020, when VIA Rail made its submissions before the CHRC, and including them will not cause him prejudice "beyond a not unreasonable delay in the completing of the responding record" (Order at para 23).

[14] AJ Duchesne ultimately found that the interests of justice would be served by granting VIA Rail's motion for leave to file a supplementary record.

(2) Motion for order extending time to serve and file responding record

[15] AJ Duchesne found that additional time to file a responding record would be required if the motion for leave to file the six additional exhibits was granted. He also found that VIA Rail's material supporting its motion satisfied all elements of the test for an extension of time in *Canada (Attorney General) v Hennelly*, [1999] FCJ No 846 (FCA) ("*Hennelly*") at para 3). As such, AJ Duchesne granted the second motion as well.

[16] However, AJ Duchesne noted that the additional exhibits can only be adduced through a sworn affidavit, as per reasons in *Access Copyright.* Mr. Mackie would then have the right to cross-examine on this affidavit if he chose to do so.

III. Issue and Standard of Review

[17] The sole issue in this case is whether AJ Duchesne erred in granting VIA Rail's motions under Rules 312(c) and 369 of the *Rules.*

[18] The applicable standard of review for an appeal for a discretionary order of an associate judge is palpable and overriding error for questions of fact and questions of mixed fact and law, and correctness for questions of law and questions of mixed fact and law where there is an extricable legal principle at issue (*Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 ("*Hospira*") at paras 64, 66, citing *Housen v Nikolaisen*, 2002 SCC 33 at paras 17-37). I note that references to "prothonotary" in this case and other relevant jurisprudence is hereby replaced by reference to "associate judge", as per sections 371 and 372 of the *Budget Implementation Act, 2022, No. 1*, SC 2002, c 10, amending *Judges Act*, RSC 1985, c J-1. In *Hospira*, the Federal Court of Appeal notes that the Court should only interfere in discretionary orders of associate judges where "such decisions are incorrect in law or are based on a palpable and overriding error in regard to the facts" (at para 64). The principles laid out in *Hospira* have been consistently applied, including in the recent decision in *Alam v Canada (Attorney General),* 2022 FC 833.

[19] In my view, AJ Duchesne did not commit an extricable error of law. This Court will only interfere with the Order if it involved a palpable and overriding error regarding a question of fact, or a question of fixed fact and law.

[20] In *Lill v Canada (Attorney General)*, 2020 FC 551 ("*Lill*"), this Court noted that the Federal Court of Appeal has described a palpable and overriding error as "an error that is obvious, plainly seen and apparent, the effect of which is to vitiate the integrity of reasons" (at para 25, citing *Madison Pacific Properties Inc. v Canada*, 2019 FCA 19 at para 26; *Maximova v Canada (Attorney General)*, 2017 FCA 230 at para 5).

IV. Analysis

[21] Mr. Mackie has not demonstrated that AJ Duchesne made a palpable and overriding error in granting VIA Rail's motions.

[22] AJ Duchesne did not err in applying the relevant legal tests for granting a motion for leave to file a supplementary record laid out by the Federal Court of Appeal in *Forest Ethics* and *Holy Alpha*, which remain good law (*Phan v Canada (Citizenship and Immigration)*, 2022 FC 916 at para 32; *Mark v Canada (Citizenship and Immigration)*, 2022 FC 411 at para 8). He did not misapprehend the facts or evidence in determining the first two requirements are met.

[23] On the first requirement, the six additional exhibits would be admissible on application for judicial review. The general rule on admissibility of evidence on judicial review is that only evidence that was before the administrative decision-makers is admissible (*Association of*

Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright), 2012 FCA 22; *Bernard v Canada (Revenue Agency)*, 2015 FCA 263; *Delois v Canada (Attorney General)*, 2015 FCA 117 at paras 41-42). Counsel for VIA Rail filed these six exhibits with the CHRC by email, and they were included in VIA Rail's March 24, 2020 submissions before the CHRC when it determined that it would not deal with Mr. Mackie's discrimination complaint. These exhibits are therefore admissible on judicial review.

[24] On the second requirement, the exhibits are also directly relevant to the issue before the reviewing court. The collective agreement governing Mr. Mackie's employment with VIA Rail and the related documents are highly relevant because they show whether Mr. Mackie had a grievance procedures available to him and whether he exhausted his alternative procedures.

[25] On the overriding consideration of whether granting VIA Rail's two motions would be in the interests of justice, AJ Duchesne did not misapprehend the facts or the evidence in answering the three questions posed by the Federal Court of Appeal in *Holy Alpha*. He properly assessed whether the evidence was available earlier or could have been available with due diligence, whether the evidence is relevant to the issues at hand, and whether the evidence would cause prejudice to the other party.

[26] Mr. Mackie specifically disputes the finding that granting VIA Rail's motions does not prejudice him. His motion record states that granting VIA Rail's motions "inflames an already existential handicap." Mr. Mackie submits that granting VIA Rail's motions causes him prejudice because further delaying these proceedings worsens his mental health issues, which he

claims were caused by VIA Rail management, and gives VIA Rail further opportunity to "target and bully" him. Mr. Mackie also claims that further delay would undermine the "sense of urgency" in resolving this matter because members of VIA Rail management have made threats to his safety. He submits that delaying this matter could be dangerous for him and therefore causes him prejudice.

[27] Mr. Mackie does not point to any palpable or overriding error in the Order that could justify this Court's intervention. AJ Duchesne's factual determinations and assessments of the evidence did not contain any such errors. For example, he did not make a palpable or overriding error in finding that VIA Rail only had actual knowledge that the CTR was missing the six exhibits on April 20, 2022, and it filed its motion for leave to file a supplementary record the next day. It is also not a factual error that these six exhibits have been in Mr. Mackie's possession since May 2020, when the CHRC matter was decided.

[28] There was also no palpable or overriding error in finding that an extension of time for filing the Respondent's record would be required if the first motion to file a supplementary record was granted. AJ Duchesne even considered the appropriateness of granting a motion outside the context of the first motion. He applied the relevant legal test from *Hennelly* in determining that all the requirements for granting the extension were met, including that the extension would not prejudice Mr. Mackie.

[29] Mr. Mackie's position appears to be that it is a palpable and overriding error to determine the delay caused by granting these motions is "not unreasonable", therefore not causing him

prejudice. However, a palpable and overriding error is "obvious, plainly seen and apparent" and "vitiate[s] the integrity of reasons" (*Lill* at para 25). While the finding that this delay is not unreasonable is subjective, AJ Duchesne did not err by making this assessment.

[30] This conclusion should not be mistaken for discounting Mr. Mackie's vulnerability as a self-represented party. At the hearing on this motion, I asked Mr. Mackie whether he had anything further to add on several occasions and I trust he felt heard by the Court on this matter.

[31] That being said, the law is clear that the decision of associate judges should be afforded considerable deference. AJ Duchesne's reasons for granting VIA Rail's motions are clear and thorough, and his reasons show that he paid due consideration to Mr. Mackie's arguments and situation.

V. Conclusion

[32] AJ Duchesne's Order granting VIA Rail's two motions and dismissing Mr. Mackie's two cross-motions does not contain a palpable or overriding error that warrants this Court's intervention. Mr. Mackie's motion to appeal the decision is therefore dismissed.

ORDER in T-1839-21

THIS COURT ORDERS that:

1. The Rule 51 motion to appeal the AJ Duchesne's Order is dismissed.

2. No costs are awarded.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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